A

PP

v.

ROSLI RIKIDIN

B

HIGH COURT MALAYA, TEMERLOH
MOHAMED APANDI ALI J
[CRIMINAL TRIAL NO: 45-15-2002]
6 FEBRUARY 2007

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in cannabis - Proof - Agent provocateur - Whether SP9 qualified as agent provocateur- Whether there was nexus between drugs found in motorcar and accused - Whether there were serious gaps in narrative of prosecution's case - Whether prosecution failed to prove a*
D *prima facie case - Whether acquitted and discharged - Criminal Procedure Code, s. 180(2) - Dangerous Drugs Act 1952, s. 40(A)*

CRIMINAL LAW: *Prosecution - Close of prosecution - Prima facie case - Sufficiency of proof - Agent provocateur - Whether SP9 qualified*
E *as agent provocateur - Whether there was nexus between drugs found in motorcar and accused - Whether there were serious gaps in narrative of prosecution's case - Whether prosecution failed to prove a prima facie case - Whether acquitted and discharged - Criminal Procedure Code, s. 180(2) - Dangerous Drugs Act 1952, s. 40(A)*

F The accused person was charged for trafficking 9712 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the end of the prosecution case, it was found that the prosecution had failed to make out a *prima facie* case against the accused and wherefore he was acquitted and discharged
G without calling for his defence. The prosecution was not happy with the said acquittal decision and thus this appeal. The facts of the case were that at 9pm on 28 February 2002, acting on information received, a police party led by one Chief Inspector Azhar Ahmad (SP8) stopped a motorcar bearing registration no.
H PCA 20 within the parking area of Hotel Green Park, Temerloh. The motorcar was driven by the accused person. The accused was given a body search and the motorcar was examined. Drugs in the form of 10 slabs were found in the boot in the motorcar. Evidence was also adduced that moments prior to the stopping of
I the motorcar PCA 20, one Detective Lance Corporal Ridzuan Yap (SP9) who was not a member of the ambush party, had stopped the same motorcar. There was an alleged conversation whereby

SP9 enquired from the accused person: "Mana barang?" The accused person had come out of the motorcar and opened the boot. SP9 then had walked away from the scene and SP8 then sprang into action, and the motorcar was again stopped and examined, that resulted in the discovery of the drugs in the boot of the motorcar. In view of the evidence of SP9, in particular his alleged enquiry of 'mana barang?' to the accused person and the accused's action of opening the boot of the motorcar, there emerged the primary issue of whether such evidence of enquiry and reaction of the accused towards the enquiry could be accepted as evidence. Counsel for the accused raised objections to such evidence while the learned deputy prosecutor declared that he was relying on the provision of s. 40A(2) of the Dangerous Drugs Act 1952 *ie*, the provision regarding agent provocateur. In the face of such reliance, the issues of possession and trafficking has to be examined on the basis that SP9 was an agent provocateur.

Held (acquitting and discharging the accused):

(1) To qualify as an agent provocateur there must be an overt act or acts of the agent to instigate by way of active participation that eventually enticed and tempted the intended target to commit the criminal offence. From the testimony of SP9, he had never met the accused prior to the encounter on the night of the arrest of the accused, did not have any negotiation to purchase the drugs with the accused person, did not arrange for the accused to supply the drugs, did not instigate the accused to supply the drugs, did not entice the accused to supply the drugs and had no inkling as to the price and quantity of the drugs involved. SP9 was not an agent provocateur and therefore his evidence would have to be subjected to the normal laws of evidence in respect of admissibility and value. Section 40A of the Dangerous Drugs Act 1952 is an exception to the general rule in the law of evidence. It is contrary to the maxims of *'Nemo tenetur se ipsum accusare'* and *'Nemo debet prodere se ipsum'*. Strict compliance to its characteristics and qualifications must be adhered to, before an agent could be clothed and accepted as an agent provocateur. (paras 13 & 18)

(2) There was no nexus between the drugs found in the boot of the motorcar and the accused. Mere discovery of drugs in the motorcar, namely in a boot does not *ipso facto* prove possession of the drugs by the driver of the motorcar. Further, at the end of the prosecution's case, there were gaps related to and consequential to the numerous unnecessary handlings of the exhibits by so many police officers in this case. There were grave doubts as to the actual exhibits recovered and the safe custody of them, from the time of recovery until actual packing and sealing and eventual handling over to the chemist for analysis. There was also doubt as to who actually was the informer in this case. SP9 made no mention of any informer or information. Even though s. 40 of the Dangerous Drugs Act 1952 accorded protection of informers of any evidence that might expose their identity, surely there must be some cogency and consistency of the evidence relating to the information received. (paras 19, 20, 21, 23 & 24)

(3) There was insufficient unfolding of evidence that resulted in serious gaps in the narrative of the prosecution's case. It was a case of bungled 'sting operation' where too many offices were involved and yet the key operator to the operation was not called or even made available. The prosecution had failed to prove a *prima facie* case and pursuant to the provisions of s. 180(2) of the Criminal Procedure Code, the accused was acquitted and discharged without calling for his defence. (para 25)

Cases referred to:

Namasiyiam & Ors v. PP [1987] 1 CLJ 540; [1987] CLJ (Rep) 214 SC ***(refd)***

PP v. Lin Lian Chen [1992] 1 AMR 46 ***(refd)***

PP v. Mohamed Halipah [1981] CLJ 92; [1981] CLJ (Rep) 238 HC ***(refd)***

Syed Ali Syed Abdul Hamid & Anor v. PP [1982] 1 MLJ 132 ***(refd)***

Teja Singh & Mohamed Nasir v. PP [1950] 16 MLJ 71 ***(refd)***

Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180(2)

Dangerous Drugs Act 1952, ss. 2, 37(h), 39B(1)(a), 40A(2)

For the accused - Gurbachan Singh; M/s Bachan & Kartar

For the prosecution - Kalmizah Salleh (Ahmad Rosli Mohd Sham & Hamdan Hamzah DPPs with him)

Reported by Suhainah Wahiduddin

JUDGMENT

Mohamed Apandi Ali J:

[1] The accused person was charged for trafficking 9712 grammes of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952.

[2] The charge reads as follows:

> Bahawa kamu pada 28hb Februari, 2002 jam lebih kurang 9.00 malam di kawasan letak kereta Hotel Park, di dalam Daerah Temerloh, di dalam Negeri Pahang, telah mengedar dadah berbahaya iaitu 9712 gram cannabis. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] For reasons best known to the prosecution, as usual eventhough the actual alleged transaction of drug trafficking involved a motor vehicle, such fact was never mentioned in the charge.

[4] Anyway at the end of the prosecutions case, it was found that the prosecution has failed to make out a *prima facie* case against the accused and wherefore he was acquitted and discharged without calling for his defence. The prosecution is not happy with the said acquittal decision and thus this appeal.

Brief Facts Of The Case

[5] At about 9pm on 28 February 2002, acting on information received, a police party led by Chief Inspector Azhar bin Ahmad (SP8) stopped a motorcar bearing registration No. PCA 20, within the parking area of Hotel Green Park in Temerloh. The motorcar was driven by the accused person and he was alone, when he was stopped by the police party. Upon being stopped, the accused refused to get out of the motorcar but after some pushing and pulling of the door, the accused was detained by Chief Inspector Azhar. The accused was given a body-search and motorcar was then examined by Chief Inspector Azhar and the drugs in the form of 10 slabs, were found in the boot in the motorcar.

[6] Evidence was also adduced that moments prior to the stopping of the motorcar PCA 20 by Chief Inspector Azhar's ambush party, one Detective Lance Corporal Redzuan Yap (SP9), who was not a member of the ambush party, had stopped the same motorcar and there was an alleged conversation whereby SP9 enquired from the accused person, who was then driving the motorcar, with the following word: "Mana barang?" The accused person then came out from the motorcar and opened the boot of the motorcar. SP9 then walked away from the scene and Chief Inspector Azhar (SP8) then sprang into action, and the motorcar was again stopped and examined, that resulted in the discovery of the drugs in the boot of the motorcar.

Issues To Be Determined

[7] At the end of the case for the prosecution, from facts adduced, the court concluded that it was satisfied that the drugs were cannabis as defined under s. 2 of the Dangerous Drugs Act 1952. But there remained 2 main issues that need to be determined, namely the issue of possession and trafficking of the drugs.

[8] In the course of the trial, in view of the evidence of SP9, Det./Lance Corporal Redzuan Yap, in particular his alleged enquiry of "mana barang?" to the accused person and the accused's action of opening the boot of the motorcar, there emerged the primary issue of whether such evidence of enquiry and reaction of the accused towards the enquiry can be accepted as evidence or not? The learned counsel for the accused raised objections to such evidence and after a short submission, the learned deputy declared that he is relying on the provision of s. 40A(2) of the Dangerous Drugs Act 1952, ie, the provision regarding agent provocateur (see p. 61 of notes of evidence). In the face of such reliance, it is clear that the issues of possession and trafficking has to be examined on the basis that SP9 is an agent provocateur. It is a do or die issue for the prosecution.

Issue Of Agent Provocateur

[9] What is an agent provocateur? Although it is referred to in the Dangerous Drugs Act 1952, there is no legal definition as to what is an agent provocateur. Section 40A of the Dangerous Drugs Act 1952 reads as follows:

40A. Evidence of agent provocateur **admissible**

(1) Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

(2) Notwithstanding any rule of law of the provisions of this Act or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank or any officer of customs, any statement, whether oral or in writing made to an agent provocateur by any person who subsequently is charged with an offence under this Act shall be admissible as evidence at his trial.

Section 40A of the Act merely speaks of the evidential admissibility and value of the testimony of an agent provocateur. Section 40A has not altered but on the other hand reaffirmed the substantive rule of law that entrapment (or use of agent provocateur) does not *per se* afford a defence to a criminal charge.

[10] *Black's Law Dictionary* (7th edn) defines an agent provocateur as:

1. An undercover agent who instigates or participates in a crime, often by infiltrating a group involved in suspected illegal conduct, to expose and punish criminal activity.

2. A person who entraps or entices another to break the law and then informs against the other as a lawbreaker.

[11] Archbold, *Criminal Pleading Evidence and Practice* (2002 edn) carries the definition of the UK Royal Commission on Police Powers 1928, which defined on agent provocateur as "a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such offence."

[12] The *Concise Oxford Dictionary* (9th edn) defines an agent provocateur as:

a person employed to detect suspected offenders by tempting them to overt self-incriminating action. (French, = provocative agent).

[13] The keywords in the above definitions of an agent provocateur are closely related to the activities of instigation, participation, enticement and temptation that resulted in an entrapment of the suspect or accused person. To my mind to qualify as an agent provocateur there must be an overt act or acts of the agent to instigate by way of active participation that eventually enticed and tempted the intended target to commit the criminal offence.

[14] Search and references to case law does not render much help as to the definition of an agent provocateur. Nevertheless the cases do throw some light as to what sort of activity or transaction that can transform an agent into an agent provocateur. In the case of *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1, the Supreme Court deliberated at length the fatal failure of the prosecution to call or make available an informer who later transformed into an agent provocateur. It is noted that the agent provocateur who posed as a buyer of the drugs was earlier introduced to the accused person and there were various negotiations for the sale and purchase of the drugs with the accused person. These must be facts involving the activities of the agent provocateur *vis-a-vis* the accused persons, prior to the actual entrapment. Refer also to the case of *Namasiyiam & Ors v. PP* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241.

The other case law in the form of:

> *Teja Singh & Mohamed Nasir v. PP* [1950] 16 MLJ 71; *PP v. Mohamed Halipah* [1981] CLJ 92; [1981] CLJ (Rep) 238

highlighted the fact that the evidence of an agent provocateur need no corroboration to found a finding by the court. In the later case of *PP v. Mohamed Halipah*, a police detective was introduced to the accused by an informer and there was some bargaining as to the price of the heroin and the amount, and eventually the price was agreed upon, before the accused produced the drugs.

[15] In the light of the above, is SP9, Det./Lance Corporal Redzuan Yap an agent provocateur as claimed by the learned deputy Pubic Prosecutor. From facts of the case that were unfolded before me, the role played by SP9, in brief are as what he said in his examination-in-chief, which reads as follows:

Pada 28/2/02, saya telah diarah oleh ASP Kassim, iaitu Pegawai Turus Risikan Pahang untuk menjadi wakil pembeli ganja dari seorang lelaki Melayu. Saya diarah untuk tunggu di tempat letak kereta di Hotel Green Park, Temerloh. Saya diarah untuk berurusan dengan lelaki Melayu yang membawa kereta Proton. Sebelum itu ada taklimat diberi. Taklimat diberi oleh ASP Kassim di Rest House Temerloh jam 7 malam pada 28/2/02. Dalam taklimat dinyatakan seorang lelaki Melayu memakai kereta Proton Aeroback warna biru gelap No. Pendaftaran PCA 20. Lelaki itu akan hantar barang dadah kepada pembeli. Saya ditugaskan menjadi wakil kepada pembeli. Tidak ada maklumat lain berkait lelaki Melayu itu. Urusan jual-beli dibuat oleh siapa saya tidak tahu. Bagaimana urusan jual-beli, pun saya tidak tahu. Bagaimana orang itu akan mengenali saya sebagai wakil pembeli ada diberi semasa taklimat. Saya diarah berdiri di situ. Siapa pembeli pun saya tidak tahu. Saya pakai seluar pendek baju kemeja, dan pakai selipar. Saya diarahkan untuk berpakaian begitu. Saya menyamar sebagai orang Cina.

[16] From the above testimony of SP9, and his consequential cross-examination, it is clear to conclude that:

(1) SP9 never met the accused prior to the encounter on the night of the accused's arrest;

(2) He has no idea as to how the accused person looks like;

(3) He did not have any negotiation to purchase the drugs with the accused person;

(4) He did not know whom he is supposed to represent when he met the accused;

(5) He did not arrange for the accused to supply the drugs;

(6) He did not instigate the accused to supply the drugs;

(7) He did not entice the accused to supply the drugs; and

(8) That he has no inkling as to the price and quantity of the drugs involved.

[17] It is noted that there was no other evidence from any other witness to unfold further as who was the actual informer and what transpired prior to the briefing on 28 February 2002 and the actual attendance and contents of the said briefing. SP9's superior, ASP Kassim was not called or made available.

[18] In view of the above, based on the law and facts, I conclude that SP9, Det./Lance Corporal Redzuan Yap is not an agent provocateur and therefore his evidence will have to be subjected to the normal laws of evidence in respect of admissibility and value. Section 40A of the Dangerous Drugs Act 1952 is an exception to the general rule in the law of evidence. It is contrary to the maxims of *"Nemo tenetur se ipsum accusare" and "Nemo debet prodere se ipsum"*. Strict compliance to its characteristics and qualifications must be adhered to, before an agent can be clothed and accepted as an agent provocateur.

Other Defects In The Prosecution's Case

[19] In his submission, the learned DPP (at p. 80 of the notes of evidence) submitted that SP9 as the agent provocateur is evidence to prove knowledge. It is trite law that knowledge alone is insufficient to prove possession. On the facts of the case, it is my finding that there is no nexus between the drugs found in the boot of the motorcar and the accused. Mere discovery of drugs in the motorcar, namely in a boot does not *ipso facto* prove possession of the drugs by the driver of the motorcar. This is particularly so when the drugs were not found in any secret compartment, whereby the presumption under s. 37(h) of the Dangerous Drugs Act 1952 can be invoked. The cases of *Syed Ali bin Syed Abdul Hamid & Anor v. PP* [1982] 1 MLJ 132 and *PP v. Lin Lian Chen* [1992] 1 AMR 46 is sufficiently clear on this issue.

[20] In my *ex tempore* decision, at the end of the prosecution's case, I also indicated that there are other gaps in their case. These gaps are related to and consequential to the numerous unnecessary handlings of the exhibits by so many police officers in this case. In brief the movements of the exhibits can be related in the following manner and order:

(1) It was first discovered, of course, by the leader of the raiding party, SP8, C/Insp. Azhar bin Ahmad, at 9pm on 28 February 2002. He lodged a police report (exh. P18) and issued a search-list (as per exh. P24);

(2) SP8, then handed the exhibits to SP6, ASP Gunarajan on the same day, at 11.15pm. A document denoting handing over and receiving the exhibits was executed and tendered as exh. P19;

(3) SP8 then handed the exhibits to SP7, C/Insp. Yusri at 4pm on 1 March 2002. A handing-over and receiving document was executed and tendered as exh. P21;

(4) SP7 then handed the exhibits to SP10, C/Insp. Mohd. Zati on the same day (ie, 1 March 2002) at 9.45pm. There was then again a document denoting handing-over and receiving the exhibits, and the document was tendered as exh. P22;

(5) SP10, then handed the exhibits to SP3, C/Insp. Mohd. Roslan at the police headquarter in Bukit Aman, on 4 March 2002 @ 3.20pm;

(6) SP3 later handed back the exhibits to SP10, on the same day (ie, on 4 March 2002) at 4.30pm. Document to denote handing-over and receiving of the exhibits was tendered and marked as exh. P10; and finally

(7) The exhibits were later sent to the chemist for analysis on 5 March 2002 and upon receiving it back it was kept at the police exhibit store on 19 August 2002.

[21] Upon perusal of the evidence, it is discovered that prior to the exhibits being handed over to SP10, C/Insp. Mohd. Zati, who was the investigating officer, the exhibits were not wrapped or sealed.

Upon analysis of the documents tendered to show the movements of the exhibits, to my astonishment, it is discovered that what was listed in exh. P19 does not tally with the items listed in exh. P21! Exhibit P19 nevertheless tallies with exh. P22. In both the exhs. P19 and P22, the items listed are: "(1) 10 ketul mampatan tumbuhan kering yang disyaki dadah (ganja); (2) sebuah kereta No. PCA 20 dan anak kunci." These two documents, P19 and P22 made no mention or reference to a black bag with the wordings, 'Athletic Sport Clothing' as stated in the search list P24 issued by SP9, Chief Insp. Azhar and in his police report, P18. Bearing in mind that P19 is the first document to show the movement of the exhibits from the raiding officer (ie, men of the ground) to the initial investigating officer, SP6, ASP Gunarajah, the question that naturally emerged is: what happened to the black bag? After all it was narrated that 9 out of the 10 slabs of the drugs were recovered from the said bag.

[22] On the movement of exhibits too, it is noted that SP3, Chief Insp. Mohd. Roslan did not indicate as to where, how and when the exhibits were kept during the more than one hour the exhibits were in his custody. Safe custody of such exhibits is particularly imperative, in view of the fact that up to that material time, the exhibits were still not wrapped and sealed.

[23] From the above evaluation of the evidence, these are grave doubts as to the actual exhibits recovered and the safe custody of them, from the time of recovery until actual packing and sealing and eventual handling over to the Chemist for analysis.

[24] Lastly there was also doubt as to who actually was the informer in this case. According to SP8, Chief Inspector Azhar the informer is one Chinese man, who gave the information to ASP Kassim (see p. 54 of notes of evidence). In another breath, earlier (at p. 45 of note of evidence) the same witness said the person who received the information was D/Kpl. Ridzuan Yap (SP9). SP9 made no mention of any informer or information. There thus exist a mystery as to the information and informer. Eventhough s. 40 of the Dangerous Drugs Act 1952 accorded protection of informers of any evidence that might expose their identity, surely these must be some cogency and consistency of the evidence relating to the information received.

Conclusion

[25] After maximum evaluation of the evidence of the prosecution, this court therefore conclude that there is insufficient unfolding of evidence that resulted in serious gaps in the narrative of the prosecution's case. It is a case of a bungled "sting operation" where too many officers were involved and yet the key operator to the operation was not called or even make available.

[26] In the upshot, I conclude that the prosecution has failed to prove a *prima facie* case and pursuant to the provisions of s. 180(2) of the Criminal Procedure Code, the accused is acquitted and discharged without calling for his defence.